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No. 09-541

In The
Supreme Court of the United States

ROBERT B. JAFARI, ET AL.,
Petitioners,

v.

WYNN LAS VEGAS, LLC, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether certiorari is warranted to decide whether a Bankruptcy Court applies federal or state choice of law rules in bankruptcy cases when the Seventh Circuit Court of Appeals expressly declined to reach that issue?

2. Did the Seventh Circuit Court of Appeals misapply Wisconsin choice of law rules so as to nullify Wisconsin's anti-gaming statute and thereby require certiorari?

SUPREME COURT RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents provide the following information.

Wynn Las Vegas, LLC is a wholly-owned subsidiary of Wynn Resort Holdings, LLC, which is a wholly-owned subsidiary of Wynn Resorts Limited, which is a publicly-traded company.

Desert Palace, Inc. is owned by Caesars Palace Corporation, which is owned by Caesars World Inc., which is owned by Harrah's Operating Company, Inc., which is owned by Harrah's Entertainment Inc.

There is no publicly-held company that owns 10 percent or more of Wynn Las Vegas LLC or Desert Palace Inc.

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STATEMENT OF THE CASE

This case is about allowance of proofs of claims in bankruptcy and which law, Nevada or Wisconsin, should a bankruptcy court apply in making that determination. This case is not about the social policy of casino gambling; or the social and economic consequences of casino gambling; or the perceived evils of casino gambling that are toted up by anyone with an anti-gambling bias. It is not about gambling to excess; unemployment; financial failure; and bankruptcy of the Debtor, Robert Jafari ("Jafari"), or anyone else. Nor is it about the millions of persons who gamble at casinos – and enjoy it. This case is about enforceability of a contract.

Respondents, Wynn Las Vegas LLC ("WLV") and Desert Palace Inc. d/b/a Caesars Palace ("Caesars" and, collectively, the "Casinos"), operate casinos in Las Vegas, Nevada. Jafari obtained loans to gamble at each of their respective casinos. Jafari had gone to Las Vegas (and elsewhere) for years to gamble. He gambled on credit granted by a number of different casinos. In 2003 or 2004, he borrowed roughly $3 million from family friends to cover gambling losses. His father, Dr. Kianoosh Jafari, then bailed him out from pre-2005 gambling debts. Jafari continued to gamble, however. In 2005, Jafari gambled on credit lines extended to him at WLV and Caesars as well as at two other Las Vegas casinos.

On or about September 17, 2005, Jafari executed a Credit Agreement at WLV which provided:

> I agree that Nevada law exclusively governs the terms of the credit line, advances or credit

> instruments. I agree that Wynn Las Vegas may litigate any dispute involving the credit line, the debt, or the payee in any Court, State or Federal, in Nevada. I submit to the jurisdiction of any Court, State or Federal, in Nevada.

The Credit Agreement established an initial line of $150,000. Jafari executed Credit Line Increase Requests in which he sought Credit Line increases totaling, at one point, up to $1,000,000. The Credit Line Increase Requests contained language similar to that of the Credit Agreement, namely that Jafari agreed that Nevada law exclusively applied and that the Nevada federal or state courts had exclusive jurisdiction of any dispute.

Credit granted was evidenced by "markers" executed by Jafari which are essentially post-dated checks drawn on his bank account. If the credit advance was not paid by the post-date, presumably from winnings, the markers would be submitted for payment against the bank account. The markers which form the basis of WLV's claim were returned with payment denied and stamped "Refer to Maker" much like an NSF check.

Jafari ran up a $250,000 marker debt at Caesars. Each of the Caesars markers were submitted for payment against his bank account and returned stamped "Refer to Maker" similar to the WLV markers.

Each of the Caesars markers contained the following agreement:

> "...I acknowledge that I incurred the debt evidenced by this instrument in Nevada. I agree that any dispute regarding or involving this instrument, the debt, or the payee shall be brought only in a court, state or federal, in Nevada. I hereby submit to the jurisdiction of any court, state or federal, in Nevada. In addition to any amounts authorized by law, I agree to pay all costs of collection, including the payee's attorneys fees and court costs."

It is undisputed that the Credit Agreement, Credit Line Increase Requests, and markers were negotiated and executed in Nevada and completely consummated in Nevada, and were to be paid in Nevada, and were returned unpaid to the Casinos in Nevada. And, they provided that Nevada law applied. Jafari used the proceeds of the loans to gamble in Nevada at WLV and Caesars.

When WLV sued Jafari in Nevada federal district court to recover $1,205,178.60 credit advanced, Jafari filed for bankruptcy in the United States Bankruptcy Court for the Western District of Wisconsin where he had relatively recently moved.

Petitioners chronicle Jafari's loss of his job as CEO of a chain of nursing homes, his need for extensive in-patient treatment, and his need to move to Boston to be near his treating physicians apparently to highlight the misfortunes wrought by casino gambling. But Jafari is not exactly a paradigm of a bankrupt debtor allegedly brought to ruin by the evil gambling casinos.

Jafari arrived in bankruptcy in February 2006 as an unemployed former nursing home CEO still pulling

down a monthly income exceeding $56,000 together with assets totaling almost $6,500,000 and liabilities of approximately $24,000,000, of which at least $8,150,000 is a claim by Jafari's father. Assets included interests in multiple entities and family trusts most, if not all, of which appear suspiciously to have been created to avoid creditor claims. In addition to large real estate holdings, Jafari's collection of personal property included a $118,000 deposit on a Las Vegas condo and substantial jewelry and vehicles including a Mercedes, BMW, Range Rover, Rolls Royce, and lots of other "toys," as reflected in Debtors' Bankruptcy Schedules.

Jafari and the Bankruptcy Trustee, Mark Wittman (the "Trustee"), filed objections (the "Objections") to the proofs of claims ("Claims") filed by the Casinos asserting that both claims should be disallowed because Jafari's obligation to each of the Claimants, was barred by Wisconsin's Anti-Gaming Statute, § 895.055, Wis. Stats.[1]

Whether to allow or disallow the Claims was presented to the Bankruptcy Court on briefs. The

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[1] **895.055. Gaming contracts void.** (1) All promises, agreements, notes, bills, bonds, or other contracts, mortgages, conveyances, or other securities, where the whole or any part of the consideration of the promise, agreement, note, bill, bond, mortgage, conveyance or other security shall be for money or other valuable thing whatsoever won or lost, laid or staked, or betted at or upon any game of any kind or under any name whatsoever, or by any means, or upon any race, fight, sport or pastime, or any wager, or for the repayment of money or other thing of value, lent or advanced at the time and for the purpose, of any game, play, bet or wager, or of being laid, staked, betted or wagered thereon shall be void.

Bankruptcy Court held that the Wisconsin Anti-Gaming Statute applied because the Bankruptcy Court was required to follow the choice of law rules of the forum state of Wisconsin rather than federal choice of law rules. *In re Jafari*, 378 B.R. 575 (Bankr. W.D. Wis. 2007), rev'd, 385 B.R. 262 (W.D. Wis. 2008), aff'd, 569 F.3d 644 (7th Cir. 2009). The Casinos appealed. The District Court reversed the Bankruptcy Court. It held that under either federal common law choice of law rules or Wisconsin choice of law rules, Nevada substantive law applied in determining the enforceability of the contracts on which the Claims were based. *In re Jafari*, 385 B.R. 262 (W.D. Wis. 2008), aff'd, 569 F.3d 644 (7th Cir. 2009).

The District Court noted, as an initial matter, that much of Debtor's Brief was devoted to policy arguments regarding the harmful nature of gambling and that Debtors suggested that both equity and sound public policy required the District Court to invalidate the Casinos Claims. That theme was continued in the Seventh Circuit and continues in the Petition to this Court. The District Court responded to those arguments stating: "... [I]t is neither necessary or appropriate for this court to venture into that tangled thicket of moral judgment and public policy." *Jafari*, 385 B.R. at 264. Instead, the District Court determined that under either federal common law choice of law rules or Wisconsin choice of law rules, applicable in a contracts case, the disputed contracts have a far greater relationship to the State of Nevada than to Wisconsin and accordingly, Nevada law should govern their enforceability. The District Court held that it was unnecessary for it to determine whether a Bankruptcy Court should follow federal or state choice

of law rules because the result was the same under either set of rules. *Jafari,* 385 B.R. at 267.

The District Court remanded the case to the Bankruptcy Court for further determination as to whether the Claims were allowable under Nevada law. Upon remand, the Bankruptcy Court, applying Nevada substantive law, allowed both Claims in the amounts as filed, together with attorneys' fees, expenses and interest. A direct appeal to the Seventh Circuit followed.

The Court of Appeals performed its own analysis of which state law applied under both federal and state choice of law rules. As did the District Court, it found the non-forum contacts with Nevada "undoubtedly are of the greater significance" and that under either federal or state choice of law rules applicable to contracts, Nevada law would govern the Casinos' Claims. And, as did the District Court, the Seventh Circuit held that it was unnecessary to decide whether federal or state law supplies the choice of law rules in a bankruptcy case because Nevada substantive law would apply either way. *In re Jafari*, 569 F.3d 644, 651 (7th Cir. 2009).

REASONS FOR DENYING THE PETITION

I. Petitioners Have Failed to Demonstrate Compelling Reasons to Grant Their Petition Where the Court of Appeals Expressly Declined to Decide Whether Federal or State Choice of Law Rules Apply in Bankruptcy Cases.

Petitioners have presented no "compelling reasons" for a Writ of Certiorari to be granted. Specifically, Petitioners fail to demonstrate that the Seventh Circuit's opinion is in conflict with a decision of this Court or another Court of Appeals. That is because it did not decide the issue whether bankruptcy courts must follow federal or state choice of law rules. Petitioners' argument is that there are compelling reasons to grant the petition because there is a conflict among other United States Courts of Appeals on the issue. Alternatively, Petitioners contend that had the Seventh Circuit decided the issue, it would automatically conflict with other Courts of Appeals no matter which side it came down upon. These reasons are not "compelling" and conflict with this Court's established precedent refusing to grant petitions where the issue is not decided in the Court of Appeals below.

It is a fundamental rule of practice that this Court does not decide questions that were never raised or decided in the court whose decision is under review. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 148 n.2, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970) (issues neither raised nor addressed by the Court of Appeals will not ordinarily be considered).

Consistent with that rule, this Court will ordinarily decline to address issues that were raised in the Court of Appeals but where the Court did not decide the case on that specific issue. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168-69, 125 S. Ct. 577, 160 L. Ed. 2d 548 (2004), citing *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109, 122 S. Ct. 511, 151 L. Ed. 2d 489 (2001) (*per curiam*); *see also*, *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470, 119 S. Ct. 924, 142 L. Ed. 2d 929 (1999).

The Supreme Court is one of "final review,"; it is not one of "first view." *FCC v. Fox Television Stations, Inc.*, ___ U.S. ___, 129 S. Ct. 1800, 1819, 173 L. Ed. 2d 738 (2009); *citing Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005). Because the Supreme Court sits as a court of final review, it is only in exceptional cases coming from the federal courts that questions not pressed or passed upon below are reviewed. *Boumediene v. Bush*, ___ U.S. ___, 128 S. Ct. 2229, 2262-63, 171 L. Ed. 2d 41 (2008) (gravity of separation of powers issues and denial to detainees of meaningful access to a judicial forum for a period of years rendered case exceptional); citing *Duignan v. United States*, 274 U.S. 195, 200, 47 S. Ct. 566, 71 L. Ed. 996 (1927); and *Cooper Industries, supra*, 543 U.S. 157, 169 (no exceptional circumstances where important issue but absence of briefing and decisions by the courts below).

Petitioners have failed to demonstrate that this is an "exceptional case." In *Adarand Constructors, supra*, 534 U.S. at 110-11, this Court rejected Petitioner's argument that his case presented questions of fundamental national importance calling for final resolution by this Court. This Court observed

that the importance of an issue should not destroy principles that control the exercise of its jurisdiction. To the contrary, the Court promotes respect for its adjudicatory process by adhering scrupulously to the customary limitations on its discretion regardless of the significance of the underlying issue. Petitioner's argue the Court should resolve the issue because of the importance of the question to the administration of bankruptcy cases as well as other federal question cases. The argument fails under this Court's established precedent.

Petitioner's argue that this Court should grant the Petition because had the Seventh Circuit decided the issue, it would immediately have been in conflict with other Courts of Appeals no matter which side of the fence the Seventh Circuit landed. The argument fails for the same reasons and under the same precedent which would deny certiorari where the issue was not determined in the Court of Appeals below. What is important is the fact that the issue was not decided below, not what the state of affairs would be had the issue been decided.

II. Certiorari Is Not Warranted Because the Court of Appeals' Decision Did Not Nullify State Law.

Section II of Petitioner's Brief is nothing more than a diatribe against the perceived evils of casino gambling, which is highly debatable, and not relevant to the present issue before the Court. The argument appears to be that because casino gambling is so reprehensible, this Court should declare it "public enemy number one" and prohibit enforcement of loans for gaming purposes on its own.

The heading to Section II is untenable, namely, "Whether Bankruptcy Courts Sitting in States Where the Enforcement of Gambling Debts is Repugnant to State Policy Should Enforce Out of State Gambling Debts is a Recurring Question of Exceptional Importance...". It ignores the fact, recognized by the Bankruptcy Court, and argued by the Respondents to the District Court and to the Court of Appeals, that even where states have anti-gaming statutes, judgments obtained for gambling debts in other states where gambling debts are legal, are enforceable in the anti-gaming law states under the full faith and credit clause of the United States Constitution. (*Jafari*, 378 B.R. at 581) Wisconsin is no exception. *See*, *Conquistador Hotel Corp. v. Fortino*, 99 Wis. 2d 16, 298 N.W.2d 236 (Ct. App. 1980) (Judgment on gambling debt from Puerto Rico count must be given full faith and credit in Wisconsin court); and see *Metro Creditors Serv. of Sacramento v. Sadri*, 15 Cal. App. 4th 1821, 19 Cal. Rptr. 2d 646 (1993) (forum state must give full faith and credit to a sister state judgment regardless of forum state's public policy on the underlying claim). Petitioners would have this Court ignore the full faith and credit clause.

Petitioners' theme is that the Wisconsin anti-gaming statute controls all issues relating to enforceability of gambling debts; including the issue of which choice of law rules a Bankruptcy Court must follow. They argue that the Seventh Circuit's decision nullifies the anti-gaming statute and that is reason enough to grant the petition citing *Leavitt v. Jane L.*, 518 U.S. 137, 144-45, 16 S. Ct. 2068, 135 L. Ed. 2d 443 (1996). Arguing that the Seventh Circuit nullified Wisconsin's anti-gaming statue begs the question: How does a Bankruptcy Court determine whether the

anti-gaming statute even applies? It does not under the facts of this case as found by the Seventh Circuit and the District Court.

Leavitt is unavailing. It involved the constitutionality of a Utah statute regulating abortion and whether certain of its provisions were severable. The Tenth Circuit held that the provision was not severable and this Court granted summary certiorari review and reversed. This Court observed however, that it does not normally grant petitions for certiorari solely to review what purports to be an application of state law, though it has done so. *Leavitt*, 518 U.S. at 144. This Court further referred to its general presumption that Courts of Appeals correctly decide questions of state law, reflecting a judgment as to the utility of reviewing them in most cases; citing *Salve Regina Coll. v. Russell*, 499 U.S. 225, 235 n.3, 111 S. Ct. 1217, 1223 n.3, 113 L. Ed. 2d 190 (1991). That general presumption, this Court pointed out, is obviously inapplicable where the Court of Appeals' state-law ruling is plainly wrong. *Id.* In this case, the Seventh Circuit's decision that Nevada law applies in this case under Wisconsin choice of law rules is not plainly wrong.

Petitioners argue that the Seventh Circuit misinterpreted Wisconsin case law on applicable choice of law rules. Specifically, they object to its determination that there is "...no authority for the conclusion that a Wisconsin court that determines through a significant contacts choice-of-law analysis that the nonforum state's law should apply nevertheless will apply Wisconsin law if enforcing nonforum law would contravene Wisconsin public policy." *Jafari*, 569 F.3d at 650-51. They contend that

under Wisconsin choice of law rules applicable in contract cases, public policy is always to be considered and may trump all other factors, citing *Heath v. Zellmer*, 35 Wis. 2d 578, 151 N.W.2d 664 (1967). The Seventh Circuit correctly rejected that argument, finding that Wisconsin case law since *Heath* has made it clear that in contractual disputes, Wisconsin courts apply the "grouping of contacts" rule. It cited *State Farm Mut. Auto Ins. Co. v. Gillette*, 2002 WI 31, 251 Wis. 2d 561, 641 N.W.2d 662, 670-71, *Haines v. Mid-Century Ins. Co.*, 47 Wis. 2d 442, 177 N.W.2d 328, 330 (1970) and *Drinkwater v. Am. Family Mut. Ins. Co.*, 2006 WI 56, 290 Wis. 2d 642, 714 N.W.2d 568, 574; all cases decided after *Heath*.

The Seventh Circuit correctly observed that in a close contracts case, if it is not clear that the non-forum contacts are of the greater significance, then a court typically analyzes, as a tie breaker, the five-choice influencing factors developed in *Heath* (the "*Heath* Factors"), one of which is consideration of public policy. However, said the Seventh Circuit, if it is clear that the non-forum contacts are of greater significance in a contracts case, then Wisconsin courts will apply the law of the non-forum state without analyzing the *Heath* Factors; citing *Hystro Prods., Inc. v. MNP Corp.*, 18 F.3d 1384, 1387 (7th Cir. 1994) and *Haines*, 177 N.W.2d at 330. *Jafari*, 569 F.3d at 649-51.

The Seventh Circuit (and the District Court) got it right. There are no Wisconsin cases where alleged public policy has overturned a significant contacts choice of law analysis.

Petitioners ask this Court to second guess the Seventh Circuit (and the District Court) on Wisconsin state law. But it is this Court's practice to accept a reasonable construction of state law by a Court of Appeals even if the examination of the state law issue without such guidance might have justified a different conclusion. *Haring v. Prosise*, 462 U.S. 306, 314-15 n.8, 103 S. Ct. 2368, 76 L. Ed. 2d 595 (1983); *citing Bishop v. Wood*, 426 U.S. 341, 346, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976). Wisconsin law does not require a conclusion different from that reached by the Seventh Circuit and the District Court. *Id.*

At the end of the day, Petitioners are proposing a choice of law rule in bankruptcy cases that would require bankruptcy courts to follow state choice of law rules because the state has public policies against certain activities notwithstanding those activities may be legal in another state. Having state public policy dictate whether a bankruptcy court should follow state choice of law rules rather than federal choice of law rules is wrong and this is not the case to establish that precedent.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Dated this 3rd day of December 2009.

Respectfully submitted,

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